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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	2 CA-CV 2010-0151
	DEPARTMENT B
SHARON L. ORINSKI,	
	MEMORANDUM DECISION
Petitioner/Appellant,	Not for Publication
	Rule 28, Rules of Civil
and	Appellate Procedure
WILLIAM ORINSKI,	
Respondent/Appellee.	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20092603

Honorable Michael J. Cruikshank, Judge

REVERSED AND REMANDED

David H. Lieberthal — Tucson
Attorney for Petitioner/Appellant

Charles R. Hamm — Tucson
Attorney for Respondent/Appellee

K E L L Y, Judge.

¶1 Appellant, Sharon Orinski, appeals the trial court's grant of William Orinksi's motion to modify spousal support and denial of her request for attorney fees. Because we agree that the court's interpretation of the parties' marital settlement agreement was erroneous and that it did not apply A.R.S. § 25-327 properly, we reverse the order and remand this matter for further proceedings.

Background

¶2 Sharon and William Orinski were married in 1980. They separated in November 2006, and a judgment of marital dissolution was entered in California in August 2007. During their marriage and at the time of their divorce, both Sharon and William resided in California. Sharon now resides in Arizona and William resides in Nevada. Sharon is a student at Pima Medical Institute working toward a certification in occupational therapy. William is employed as a freelance consultant in the biotechnology industry.

¶3 The parties entered into a marital settlement agreement, which was incorporated into the final judgment of dissolution. In 2009, pursuant to the Uniform Enforcement of Foreign Judgments Act (A.R.S. §§ 12-1701 through 1708) and Rule 24, Ariz. R. Fam. Law P., William filed the California judgment in Pima County. Thereafter, he filed a petition to modify spousal maintenance, also in Pima County, arguing the settlement agreement dictated that the sale of the marital home triggered modification of the spousal support, that he was "earning significantly less," and that Sharon's "need ha[d] been reduced considerably." Sharon filed a response to William's petition denying the need for modification of support; she also filed a counter-petition in which she

requested that William be required to appear and, essentially, show cause why he should not be found in contempt of court for failing to maintain a one million dollar life insurance policy naming her as fifty-five percent beneficiary and each of the couple's three adult children as fifteen percent beneficiaries as ordered in the decree pursuant to the settlement agreement. Both Sharon and William requested attorney fees.

¶4 Following a hearing, the trial court issued an order modifying spousal support, finding that, based on the language of the parties' settlement agreement, "review [was] mandated and no further showing of a change in circumstances beyond the sale of the residence [was] necessary for a modification." The order reduced Sharon's spousal support from $5,500 to $3,000 per month, required William to continue paying Sharon's health insurance until Sharon became eligible for health insurance on her own, and obligated him to pay sixty percent of any uncovered medical expenses. The court also denied Sharon's counter-petition for contempt, finding its requirement that William maintain a $500,000 life insurance policy on his own life that named Sharon as the beneficiary, "constitute[d] a remedy adequate to ensure [Sharon's] interests as to the life policy." Sharon filed a timely notice of appeal.[1]

[1]Although Sharon appeals the modification of spousal maintenance, she does not specifically contest the court's resolution of the insurance policy issue. But we note that there appears to be no basis in law for the court's action in this regard. Section 25-327 allows the court to reopen issues of spousal support and health insurance, not life insurance. And the terms of the agreement itself refer only to reexamination of spousal support and health insurance. Generally, life insurance is considered part of the property settlement and therefore is "not subject to modification or termination." *Gaddis v. Gaddis*, 191 Ariz. 467, 469, 957 P.2d 1010, 1012 (App. 1997); *see also Lock v. Lock*, 8 Ariz. App. 138, 143, 444 P.2d 163, 168 (1968). Furthermore, the agreement provided that "[Sharon] shall continue to be the 55% beneficiary of said [$1,000,000] policy, as

Discussion

I. Interpretation of the Marital Settlement Agreement

¶5 Sharon asserts that the trial court incorrectly interpreted the marital settlement agreement when it found "review is mandated and no further showing of a change in circumstances beyond the sale of the residence is necessary for modification." She argues that although the agreement mandated review when the marital home was sold, there had to be "a showing of changed circumstances" before the court could modify the amount of spousal maintenance William was required to pay. She further contends that the court's finding contravened § 25-327. The trial court's interpretation of the marital settlement agreement and of § 25-327 are questions of law that we review de novo. *See Waldren v. Waldren*, 217 Ariz. 173, ¶ 6, 171 P.3d 1214, 1216 (2007).

¶6 Dissolution decrees are subject to the same standards of interpretation as any contract. *Cohen v. Frey*, 215 Ariz. 62, ¶ 11, 157 P.3d 482, 486 (App. 2007). In determining the intent of parties to a contract we first look to the plain meaning of the language used. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 9, 218 P.3d 1045, 1050 (App. 2009). "'Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto.'" *Id., quoting Mining Inv. Group, L.L.C. v. Roberts*, 217 Ariz. 635, ¶ 16, 177 P.3d 1207, 1211 (App. 2008).

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long as [William] shall be obligated to pay spousal support . . . [and] [a]s of May 31, 2010, each of the three children of the parties shall be a 15% beneficiary of said policy." The court's decision not only reduced Sharon's benefit in the policy to less than fifty-five percent but also eliminated the interests of the three adult children, who were not parties to this action.

¶7 The disputed language in the settlement agreement provides that "[w]hen the equalization payment provided for by paragraph [11] is paid in May of 2010, the issue of spousal support shall be reexamined, without either party having to show a change of circumstances, together with the payment of health insurance for Wife." The dictionary defines "reexamination" as "a second or new examination." *Webster's Third New International Dictionary* 1907 (1971). "Examine" is defined as "to seek to ascertain," whereas "modify" means to "to change the form or properties of for a definite purpose." *Webster's Third New International Dictionary* 790, 1452. The unambiguous language of the agreement provides that spousal support "shall be reexamined," not "modified," without showing changed circumstances.

¶8 Furthermore, even if the parties had intended by this language to allow modification without showing changed circumstances, they could not relieve the court of its duty to determine whether modification was justified nor could they relieve the parties of the burden of establishing there are "changed circumstances that are substantial and continuing" before the court could modify the decree under § 25-327. *See Cohen*, 215 Ariz. 62, ¶ 14, 157 P.3d at 487 (finding terms of decree "should not deter [this court] from construing the decree's language in the context of the [trial] court's statutory duty"); *see also Johnson v. Johnson*, 105 Ariz. 233, 242, 462 P.2d 782, 791 (1969) (court order ostensibly giving husband privilege to unilaterally terminate support payments "a nulity [sic] . . . constitut[ing] an unlawful delegation of the court's authority to determine facts which justify a modification"). Section 25-327 provides that "the provisions of any decree respecting maintenance or support may be modified . . . *only* on a showing of

changed circumstances that are substantial and continuing." (Emphasis added.) The section is a limitation on the court's power. *In re Marriage of Rowe*, 117 Ariz. 474, 475, 573 P.2d 874, 875 (1978). Parties cannot, by contract or otherwise, bind a trial court or confer upon a court authority in excess of that which is provided by statute. A.R.S. §§ 25-317(B), 25-327; *Breitbart-Napp v. Napp*, 216 Ariz. 74, ¶ 14, 163 P.3d 1024, 1029 (App. 2007) (court not bound by agreement regarding maintenance or support). Therefore, the court lacked statutory authority to modify the amount of spousal maintenance absent a showing that there had been a substantial and continuing change in circumstances.

II. Requirement of Substantial and Continuing Changed Circumstances

¶9 Although the trial court found William was not required to show there had been "a change in circumstances beyond the sale of the residence" to justify modification of William's spousal maintenance obligation, it found, in any event, that "the substantial reduction in [Sharon]'s living costs, together with the availability of the $175,000 sale proceeds, [from the residence] . . . provide[d an] ample showing of a substantial and continuing change of circumstances[.]" Sharon argues "the court incorrectly limited its inquiry of modification criteria and failed to properly evaluate the criteria that it did consider." Specifically, she maintains that neither the sale of the house, nor her reduction in living costs "singly or in combination," satisfies the requirements of § 25-327 or justifies a reduction in support. We agree.

¶10 Generally, we review a trial court's modification of a divorce decree for abuse of discretion. *Fletcher v. Fletcher*, 137 Ariz. 497, 497, 671 P.2d 938, 938 (App.

1983). But "the trial court, in the exercise of its discretion, must [adhere to] certain guidelines." *Shaffer v. Shaffer*, 16 Ariz. App. 530, 532, 494 P.2d 730, 732 (1972). When there is insufficient evidence of a substantial and continuing change in circumstances under § 25-327, we must reverse. *See Scott v. Scott*, 121 Ariz. 492, 495-96, 591 P.2d 980, 983-84 (1979); *cf. Cooper v. Cooper*, 167 Ariz. 482, 491, 808 P.2d 1234, 1243 (App. 1990). In modifying a support agreement, the trial court is required to consider:

> First, the financial needs of the wife, measured by the social position into which her marriage placed her; second, the ability of the wife to produce income sufficient to sustain her in this status; and third, the financial condition of the husband and his ability to make payments for the support and maintenance of his former wife.[2]

Shaffer, 16 Ariz. App. at 532, 494 P.2d at 732.

¶11 In *Norton v. Norton*, 101 Ariz. 444, 446, 420 P.2d 578, 580 (1966), our supreme court concluded that by eliminating an alimony award without considering all of the relevant factors, the trial court had acted arbitrarily and had abused its discretion. *Id.* at 447, 420 P.2d at 581. In determining whether a reduction in spousal support is appropriate, the court must consider "the same factors as are required in determining the reasonableness of an award for support and maintenance at the time of the original decree." *Id*. at 445, 420 P.2d at 579. Section 25-319, A.R.S., enumerates these factors. The court also was required "to determine whether the change in . . . circumstances . . . was something more than a transitory or temporary condition." *Nace v. Nace*, 107 Ariz. 411, 414, 489 P.2d 48, 51 (1971). Based on the record and the language of the trial

[2]The trial court determined that William's reduced income did not justify modification of spousal maintenance and was not a basis for its decision.

court's order, we do not believe the court performed the level of searching analysis required by § 25-327.

¶12 The sale by one party of the marital home "is not, in and of itself, a changed circumstance." *Scott*, 121 Ariz. at 495, 591 P.2d at 983. Furthermore, a change anticipated at the time of the divorce decree is generally insufficient to justify a finding of changed circumstances. *Chaney v. Chaney*, 145 Ariz. 23, 26, 699 P.2d 398, 401 (App. 1985). The trial court found that "[t]he agreement clearly anticipates that the sale of the marital residence will itself be a financially meaningful event . . . which would logically affect [Sharon]'s need for spousal maintenance." We agree that the sale of the house is a factor that might justify a reduction in spousal maintenance but only provided there was a showing that the sale amounted to a substantial and continuing change of circumstances. § 25-327; *see also Nace*, 107 Ariz. at 413, 489 P.2d at 50.

¶13 Similarly, that the receiving spouse's monthly living expenses have decreased can be sufficient to justify a reduction of spousal maintenance if the reduction is shown to be substantial and continuing. *Scott*, 121 Ariz. at 495, 591 P.2d at 983. Although the trial court determined that "the substantial reduction in [Sharon]'s living costs" constituted a substantial and continuing change of circumstances, its factual findings did not support this determination. The court found only that Sharon's "housing costs" had been reduced in the amount of two-thousand dollars ($2,000) and that Tucson "has a substantially lower cost of living than Ventura, California," factors that have little meaning if Sharon does not stay in Arizona after completing school. And its findings that Sharon is unemployed, working toward a certification in occupational therapy, and

suffering from a "serious medical issue," suggest that even with the reduction of housing costs and sale of the house, Sharon presently lacks "the ability . . . to produce income sufficient to sustain her in [her] status." *See Shaffer*, 16 Ariz. App. at 532, 494 P.2d at 732.

¶14 Additionally, nothing in the record establishes whether the court considered or concluded that Sharon's reduced housing costs would be a continuing circumstance, a consideration we think § 25-327 commands. Sharon testified that she had moved to Tucson to attend school because the lower costs in Tucson would permit her to support herself using her spousal support while attending school, and she had no intention of remaining in Arizona. The court found that Sharon anticipated completing school in August 2011. But it is speculative whether she will complete the program as anticipated or whether her completion of school will affect her financial circumstances. *See Scott*, 121 Ariz. at 494, 591 P.2d at 982 ("speculative evidence . . . is not sufficient to sustain a finding of substantial changed circumstances").

¶15 The evidence presented to the trial court showed that Sharon's current living expenses were different from those at the time of the divorce decree—not that they were substantially lower. The record indicates Sharon's overall expenses currently exceed the amount of spousal support she receives by a substantial amount. Sharon has spent a significant amount of money attending school and on items such as medical expenses and supporting her adult daughter whom she felt was "in trouble." A party is not required to expend all resources, "leaving herself nothing for the future." *Ruskin v. Ruskin*, 153 Ariz. 504, 506, 738 P.2d 779, 781 (App. 1987). Although Sharon's housing

expenses have been reduced, there was no showing this was a substantial and continuing reduction in her total living expenses, and we will not assume "the presumptuous duty of telling [Sharon] how to live her life, how and where to spend her money, or even to spend it at all. If she has decided to temporarily alter her former living style, we will not label this as a 'change of circumstances.'" *Nace*, 107 Ariz. at 414, 489 P.2d at 51. Therefore, because we conclude the court abused its discretion by modifying William's spousal support obligation, we reverse.

III. Attorney Fees

¶16 Because we reverse the trial court's order, we also reverse that portion of its order relating to attorney fees. Section 25-324, A.R.S., permits the court, "after considering the financial resources of both parties and the reasonableness of the positions . . . taken throughout," to order reasonable attorney fees. Although it found that William had "significantly greater financial means," the court maintained that Sharon's "position on the modification of spousal maintenance [was] unreasonable" and therefore ordered the parties "to bear his or her own fees and costs." Because we disagree that Sharon's position below was unreasonable, we conclude that the trial court abused its discretion in denying attorney fees on this ground. *See Roden v. Roden*, 190 Ariz. 407, 412, 949 P.2d 67, 72 (App. 1997) ("It is an abuse of discretion to deny attorneys' fees to the spouse who has substantially fewer resources, unless those resources are clearly ample to pay the fees."). We remand this matter to the trial court so that it may address the issue of attorney fees in light of this decision. Sharon has also requested attorney fees on appeal

pursuant to A.R.S. § 25-324. Therefore, contingent on her compliance with Rule 21, Ariz. R. Civ. App. P., we award Sharon her reasonable attorney fees incurred on appeal.

Disposition

¶17 We reverse the judgment modifying the decree.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge